83-5339

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

September Term, 1983

No. 83-

DENNIS DICK,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

THOMAS J. MCHUGH, JR.
P. O. Box 535
Fayetteville, Georgia 30214

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the summary denial of Petitioner's extraordinary motion for new trial based on duly discovered evidence violated Petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?

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STATE OF GEORGIA,

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

Petitioner Dennis Dick respectfully prays that a writ of Certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is attached hereto as appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered June 1, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides relevant part:

"No person shall be held to answer for capital, or otherwise infamous crime...nor be deprived of life, liberty, or property, without due process of law...."

2. This case involves the Sixth Amendment to the Constitution of the United States, which provides relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. This case involves the Eighth Amendment to the Constitution of the United States, which provides relevant part:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides relevant part:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Petitioner Dennis Dick, respectfully shows the Court that he was convicted for the offense of murder and armed robbery in

direct appl ended 6/22/81

the Superior Court of Dawson County, Georgia and sentenced to death on October 26, 1979. His convictions were confirmed on direct appeal to the Supreme Court of Georgia. Dick v. State, 246 Ga. 697, cert. denied, 451 U.S. 951, 68 L.Ed.2d 357 (1981). Rehearing was denied on June 22, 1981.

Subsequently, Petitioner's Counsel in the lower Court received a letter from one Billy Webster indicating that Dennis Dick, your Petitioner, had been involuntarily drugged on the evening of the murder for which he was convicted. Mr. Webster had likewise been charged with the offense of murder in the same incident, however, after trial by jury, he was acquitted. Mr. Webster's letter indicated that the drugging had taken place at the contrivance of one Chris Hoerner. Mr. Hoerner like Mr. Webster and your Petitioner was tried for the offense of murder and received a life sentence thereon. Petitioner subsequently filed an extraordinary motion for new trial based on newly discovered evidence and the same was summarily denied without hearing by the lower Court. The denial of the extraordinary motion for new trial was upheld by the Supreme Court of Georgia. Dick vs. State 248 Ga. 898 (1982).

New info

On April 20, 1982, the Superior Court of Butts County, Georgia entered an Order staying execution thereby allowing your Petition to proceed with his Petition of Writ of Habeas Corpus which had been filed the day prior. The State sought and obtained a certificate of immediate review which led to a denial by the Supreme Court of Georgia in Zant vs. Dick, Case No. 38783. Pursuant to the decision rendered therein, the case

State habeas

what was exec. date?

was remanded for further proceedings.

On October 18, 1982 and evidentiary hearing was held on the Motion for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. Motions for Writ of Habeas Corpus ad Testificandum as to Chris Hoerner and motions for seeking expenses for expert witnesses were overruled. Testimony was then taken from Billy Webster which corroborated the allegations that your Petitioner had been involuntarily drugged on the evening of the murder. Notice of appeal from an adverse ruling was filed on November 29, 1982. Upon consideration, the Supreme Court of Georgia in its Order dated February 4, 1983 remanded the case to the trial Court with direction that a Writ of Habeas Corpus ad Testificandum issue to secure testimony of Chris Hoerner. On March 14, 1983 pursuant to the direction of the Supreme Court of Georgia, the testimony of Chris Hoerner was received. In that hearing, Chris Hoerner testified that on the date of June 2, 1979 that he secretly administered two capsules of a drug which he believed to be Turinol to Dennis Dick by secreting them in the can of beer that was consummed by Dennis Dick. (T-7,8)

Mr. Hoerner's testimony indicated that subsequent to ingesting the beer with the secreted capsules, Dennis Dick's behaviour became suddenly erratic and he "acted like a mad man." (T-10)

Mr. Hoerner's testimony confirmed the allegations and testimony by Mr. Billy Webster that at the time of the shooting Dennis Dick was experiencing "unusual behaviour, other than one who would be intoxicated."

"He was in a rage."
"He was out of it. He was out of touch with reality."

(T-25)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Upon receipt of the letter of Mr. Billy Webster, dated 3-6-81, Counsel proceeded to attempt to locate Mr. Webster in order to corroborate the allegations made by him concerning the involuntary intoxication of Dennis Dick. When the same was accomplished, the extraordinary motion for new trial, which has given rise to the issues herein presented, was filed in the Superior Court of Butts County, Georgia. Your Petitioner has since thereafter in his pleadings and arguments before the lower Court raised the issue of violation of rights guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. (T-108) During the intitial hearing on the Writ of Habeas Corpus the Constitutional issues were raised and preserved in the pleadings and argument. (T-113)

The Habeas Court after hearing determined that denial of his extraordinary for new trial was not violative of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, concluding that the affects of any such involuntary drugging of Dennis Dick on the night in question would be speculative.

The Supreme Court of Georgia subsequently on June 31, 1983 denied your Petitioner's Application for a Certificate of Probable Cause to Appeal filed in the case.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DENIAL OF THE EXTRAORDINARY MOTION FOR NEW TRIAL VIOLATED YOUR PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The facts in this case create an important question that has not been previously addressed by this Court, to wit, whether or not one convicted of a crime who subsequently learns that he was involuntarily intoxicated or drugged at the time of the commission of the crime for which he has been convicted, is entitled to a new trial wherein such evidence of such involuntary intoxication may be raised.

Pursuant to the laws of the State of Georgia, as codified as Georgia Code Ann. Section 27-704, "A person shall not be found guilty of a crime when at the time of the act...constituting the crime, such person because of involuntary intoxication, did not have sufficient mental capacity to distinguish between right and wrong in relation to such act. Involuntary intoxication means intoxication caused...by the coercion, fraud, artifice, or contrivance of another person."

Under the facts in the case being brought before the Court, Petitioner Dennis Dick learned of facts which not only

There was a voluntary confession

would have afforded a basis upon which the triers of fact could have reached a conclusion different from that reached in the guilt-innocence phase , but which could have had a profound effect if introduced during the sentencing phase of his case. Further, the facts discovered subsequent to his conviction and corroborated during the hearings below offer Petitioner a total and complete defense to the charges made against him.

Just as it is virtually impossible for your Petitoner to guarantee that if afforded a new trial that he would be acquitted or receive a less harsh verdict, so too, it is equally impossible for the Court below to determine that in light of the newly discovered evidence no change in the outcome would be forthcoming. The principle that should then guide the Court particularly in a capitol case is to weigh the balance of the cost to the state to provide another trial against the tragedy of imprisoning and/or executing an innocent man.

In this case, the trial Court summarily denied the extraordinary motion for new trial without a hearing on the merits. Upon what set of facts did the Court exercise its discretion? When newly discovered evidence which otherwise meets all of the criteria for granting of new trial might well result in a different verdict, it is the duty of the Court to grant a new trial to permit a jury to find a true verdict. U.S. v. Mitchell, 29 F.R.D.157 (1962).

got a hearing

This case is distinguished from those cases in which the newly acquired evidence consists of a new legal theory. U.S. v. Hoffa, 390 U.S. 924 (1965); U.S. v. Hamling, 424 U.S. 911 (1975).

Only if TJ feels could not result in diff verdict

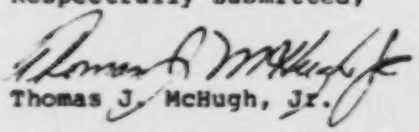
In the present case there has been discovered competent evidence which is not only material to the issue of competency of the defendant at the time of the crime, but further provides the accused with a total defense to the charges. The Due Process provisions and the prohibitions of cruel and unusual punishment of the Constitution mandate the granting of a new trial in this matter.

If a state wishes to authorize capital punishment it has a constitutional responsibility to avoid the arbitrary and capricious infliction of the death penalty. Godfrey v. Georgia, 446 U.S. 420 (1980).

CONCLUSION

Petitoner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,



Thomas J. McHugh, Jr.

P.O. Box 535

Fayetteville, Georgia 30214

Attorney for Petitioner

August 31,1983

Atlanta, Georgia

EXHIBIT "A"

Application No. 2483

SUPREME COURT OF GEORGIA

ATLANTA, June 1, 1983

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DENNIS DICK V. ROBERT FRANCIS, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, C.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the annexed petition for writ of certiorari on respondent by depositing a copy thereof in the United States mail, first class mail,postage prepaid addressed as follows:

Mr. William B. Hill
Assistant Attorney General
State of Georgia
132 State Judicial Building
40 Capitol Square S.W.
Atlanta, Georgia 30334

This day of August 31, 1983.

Thomas J. McHugh, Jr.
P.O. Box 535
Fayetteville, Georgia 30214

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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1983

DENNIS DICK,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A." Petitioner shows the Court respectfully that the application will be supplemented with such additional affidavits as may be required by the Court.

Respectfully submitted,

ATTORNEY FOR PETITIONER

AFFIDAVIT

STATE OF GEORGIA

COUNTY OF FULTON

Before me the undersigned, an officer authorized by law to administer oaths, appeared Thomas J. McHugh, Jr., who being duly sworn deposes and says as follows:

I am member in good standing of the Bar of the State of Georgia;

I am attorney of record for Applicant Dennis Dick;

I have agreed to represent Applicant without fee or remuneration of any kind;

I have personal knowledge of Applicant's financial circumstances and have determined that he is without funds or resources to bring this action;

I have made this affidavit because sufficient time does not exist to obtain the Affidavit of Poverty of Dennis Dick;

Applicant is known by affiant to be currently in the custody of the State of Georgia at the Georgia Diagnostic and Classification Center, Jackson, Georgia;

Applicant has made Affidavits of Poverty on prior occassions and that his financial condition has not changed since the time of making such affidavits.

Thomas J. McHugh, Jr.

Signed and Sworn before me,
this day of August 30, 1983.

Notary Public, Georgia, State at Large
My Commission Expires Nov. 16, 1985

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SUPREME COURT, U.S.

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83-5339

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MOTION FOR LEAVE TO PROCEED
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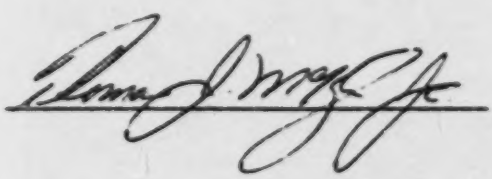
Petitioner, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,



ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1983

DENNIS DICK

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Dennis Dick, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to relief.

1. Are you presently employed? Yes ___ No ✓

a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received. I've been confined since 1979

2. Have you received within the last twelve months any money from any of the following sources?

a. Business, profession or form of selfemployment?

Yes ___ No ✓

b. Rent payments, interest or dividends?

Yes ___ No ✓

c. Pensions, annuities or life insurance payments?

Yes ___ No ✓

d. Gifts or inheritances?

Yes ___ No ✓

e. Any other sources?

Yes ___ No ✓

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own cash, or do you have money in checking or savings account?

Yes ___ No ✓ (Include any funds in prison accounts.)

If the answer if "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ✓

If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

I have 1 child, but have been unable to support him.

I understand that a false statement or no answer to any questions in this affidavit will subject me to penalties for perjury.

Lonnie Dick

STATE OF GEORGIA
COUNTY OF Butts

Lonnie Dick, Being first duly sworn under oath, presents that he had read and subscribed to the above and states that the information therein is true and correct.

Lonnie Dick

Subscribed to and sworn to before me,
this the 14 day of September, 1983.

Notary Public

My Commission expires:

December 14, 1984

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OCT 6 1983
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CLERK

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OCTOBER TERM, 1982

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STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

Respectfully submitted,

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
Counsel of Record for the Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

SUSAN V. BOLEYN
Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3359

QUESTION PRESENTED

1.

Whether this Court should grant a writ of certiorari to examine the denial of Petitioner's extraordinary motion for a new trial, when an examination of the decisions of the state courts below makes it readily apparent that the denial of the same was squarely, clearly and adequately based on nonfederal grounds, i.e., the failure of Petitioner to comply with state law.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

PRIOR PROCEEDINGS

The Petitioner, Dennis Dick, was convicted of murder and armed robbery on October 26, 1979 upon Indictment No. 79-3 in the Superior Court of Dawson County, Georgia. Respective sentences of death and a consecutive sentence of life imprisonment were imposed on October 27, 1979.

Petitioner's convictions and sentences were affirmed at Dick v. State, 246 Ga. 697, 273 S.E.2d 124, cert. denied, 451 U.S. 976 (1981).

From the denial of relief on direct appeal Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, which petition bore Civil Action No. 5181.

By notice dated September 29, 1981 Petitioner voluntarily dismissed the aforementioned habeas petition in order that he might be able to pursue an extraordinary motion for a new trial in the court of conviction.